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No. 80-~~453~~ 543

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

ORIGINAL COPY

STATE OF NEW YORK,

Petitioner,

v.

ARCHIE WILLIAM HOWARD,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Archie William Howard, respondent herein, respectfully applies for leave to proceed in forma pauperis in this proceeding for a writ of certiorari to the New York Court of Appeals, and requests that the undersigned be assigned to represent him in this Court.

Dated: New York, New York
October 24, 1980

Respectfully submitted,

HENRY WINESTINE
WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Attorneys for Respondent

No. 80-453

IN THE

SUPREME COURT OF THE UNITED STATES

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STATE OF NEW YORK,

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Henry Winestine, being duly sworn, deposes and says:

1. I am an attorney on the staff of The Legal Aid Society, and represented respondent Archie William Howard on his appeals in the New York courts from his conviction on January 2, 1979. I submit this affidavit in support of his application to proceed in forma pauperis as respondent in this proceeding for a writ of certiorari.

2. Mr. Howard was represented by The Legal Aid Society in the trial court, as well as on his appeals. He was incarcerated from the date of his conviction until July 11, 1980, when he was released by virtue of the reversal of his conviction by the New York Court of Appeals.

3. I am advised by Mr. Howard that he did not obtain employment until September 26, 1980, when he began working for the D & D grocery store, 142nd Street at Lenox

Avenue in New York City. His employment is only for weekends and he receives only $2.50 per hour

3. Mr. Howard also advised me that he has not received any other income within the past twelve months from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources, and that he has no cash or bank accounts, or other valuable property. No one is dependent upon him for support.

Henry Winestine

Sworn to before me this
24th day of October, 1980

Myra K. Wallach

MYRA K. WALLACH
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-9512825
Qualified in Queens County
Term Expires March 30, 1982

CERTIFICATE OF SERVICE

Henry Winestine, a member of the bar of the Supreme Court of the United States, certifies that on October 24, 1980, a copy of the annexed Application to Proceed in Forma Pauperis was served by mail on Hon. Mario. Merola, District Attorney, Bronx County, at 215 East 161st Street, Bronx, New York 10451.

Dated: New York, New York
October 24, 1980

Henry Winestine

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STATE OF NEW YORK,

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v.

ARCHIE WILLIAM HOWARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

HENRY WINESTINE
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The Legal Aid Society
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[212] 577-3420
Attorneys for Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Should the petition, filed four weeks out of time, be considered by the Court?

2. Is review by this Court barred where the decision of the state court is based upon adequate and independent state grounds?

3. May a police officer lacking reasonable suspicion that a crime has been commited, seize a citizen who has walked away from an inquiry and then flees when the officer attempts to physically stop him?

4. Should this Court review a factual determination by a state court that a suspect did not intend to abandon property, and if review is warranted is the state's conclusion correct as a matter of fact or on the alternative ground that there can be no abandonment when property is discarded during an illegal seizure?

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case, but adds one additional fact:

Officer Brosnan testified that as he emerged from his police car after respondent had already walked away from the first inquiry, he intended to stop Howard, using physical force if necessary.

REASONS FOR DENYING THE WRIT

A. The petition is untimely

The judgment of the New York Court of Appeals was entered July 3, 1980. The petition for certiorari was due, under new Rule 20.1, on September 2, 1980. The petition was not filed until October 1, 1980, four weeks out of time. Petitioner, without seeking an extension of time pursuant to Rule 29, asserts unawareness of the new Rules and asks the Court to accept the petition.

Rule 20.1 provides that an extension of time for filing a petition for certiorari shall be granted "for good cause." Not only has petitioner failed to make proper application for an extension (presumably because such an application must be made within the period sought to be extended) but has failed to show good cause.

Lack of awareness of the new Rules is not an excuse. They were adopted April 14, 1980, with widespread publicity. They were promptly published in at least the following widely-read sources:

48 United States Law Week 4339 (April 15, 1980)

63 Lawyers Edition 2d Series, Advance Sheet No. 4 (May 15, 1980)

85 Federal Rules Decisions 435, Advance Sheet No. 2 (May 1980)

28 United States Code Annotated, volume containing Rules of the Supreme Court, pocket part distributed April 1980

12 Moore's Federal Practice

The New York Law Journal* of April 15, 1980, contained a front-page article concerning the new Rules. It expressly referred to the shortened time in which a petition may be filed to review a state court criminal case.

It is perhaps reasonable to excuse late filing by a pro se criminal defendant or a practitioner without ready access to an adequate library. It is another thing altogether for the Appeals Bureau of one of the nation's major prosecutor's offices to seek to avoid time restraints because of ignorance.

Petitioner urges that the untimely petition be considered because of the "seriousness of the issues" (petition at 2) and the "burdensome" and "dangerous" effect of the decision on law enforcement (petition at 11, 12-13). Respondent disputes those characterizations, but if they prove to be well-founded, other appropriate cases will certainly arise in which this Court can consider the issues.

B. The decision of the New York Court of Appeals rests on adequate state grounds.

It is clear that the New York Court of Appeals assumed that the search and seizure clause of Article 1, Section 12 of the New York Constitution and the Fourth Amendment to the United States Constitution are congruent as far as this case is concerned. Repeated references are made to both. But it is apparent from the multitude of New York cases relied upon and the numerous citations to the state constitution that state law as well as federal is being expounded, and that the court's decision was based as much on the state constitution as the federal. New York is free to adopt stricter constitutional standards than those contained in the

* The New York Law Journal is a daily newspaper which is the official publisher of calendars and decisions of the state and federal courts in New York City.

United States Constitution and has expressly done so in the past. E.g., People v. Elwell, 50 N.Y.2d 231, 235 (May 6, 1980); People v. Isaacson, 44 N.Y.2d 511, 519-520 (1978); People v. Hobson, 39 N.Y.2d 479, 483-484 (1976). Moreover, the New York court also grounded its decision on the state's "stop and frisk" statute, New York Criminal Procedure Law §140.50, (appendix to the petition 4a-5a), which does not implicate the United States Constitution in any respect in the context of this case.

This Court "will not review judgments of state courts that rest on adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 125 (1945). And where a state court decision is based "on both state and federal grounds, either of which would have been dispositive," review is similarly barred. Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562, 568 (1977).

C. No issues in this case merit review

Respondent's flight

The petition misstates the issue decided by the New York court as dealing with a suspect who flees after an attempt by the police "to lawfully stop" him (petition at 9) and "flight by suspects from the exercise of reasoned authority" (petition at 11). Those statements beg the question by assuming that a stop was proper in the circumstances. The real issue was whether the initial attempt to stop was lawful.

Petitioner fails to consider the facts leading to respondent's flight: the officers, having no information which justified more than a mere inquiry, sought to question respondent, but he "look[ed] directly at the officers, . . . ignored them and continued walking" (as stated by the New York Court of Appeals, appendix to the petition 3a). It was only after respondent walked away that the officers repeated

their request as one of them emerged from the police car to stop him, precipitating respondent's flight.*

Petitioner does not argue that the officers, prior to the flight, possessed the reasonable suspicion which would have justified physically stopping Howard. Such a stop would have been a "seizure", defined by the majority in Terry v. Ohio, 392 U.S. 1, 16 (1968), as well as the concurrences, 392 U.S. at 32-33, 34, as interference with a citizen's "freedom to walk away." Having exercised his right to walk away, Howard's flight when the officer's persisted was certainly an appropriate response.

This view is supported by Reid v. Georgia, ___U.S.___, 48 U.S.L.W. 3847 (June 30, 1980), in which a Georgia court's judgment was reversed in a strikingly similar case. The per curiam opinion recites the alternative holding of the state court that probable cause to search existed after the defendant, stopped by officers, discarded his shoulder bag and fled, but the Court vacated the conviction without discussion of the suspect's flight.

Beyond the issue of the correctness of New York court's decision is the question whether this case warrants review. Contrary to petitioner's concern about the effect of the decision below on law enforcement, it will have few repercussions. As the New York court observed, "There are surprisingly few cases" dealing with cititzen's refusal to respond to police inquiry (appendix to petition 8a), and there is no reason to believe that a significant number of

* Although not mentioned in the opinion of the Court of Appeals Officer Brosnan testified at the hearing that his intent was to physically stop and question respondent. The fact of Howard's flight indicates that he was aware of the officer's intention. Whether this perception was based on street wisdom or a non-verbal communication from the officer is of no importance. An attempt to seize respondent occurred when Brosnan emerged from the car, before Howard took flight.

new cases will emerge. The impact of the case will be minimal, and hardly warrants review by this Court.

The abandonment issue

The court below found that under the circumstances established at the suppression hearing, respondent did not intend to abandon the case he was carrying. Although the court characterized the matter as "essentially a question of constitutional law" (appendix to petition 11a), it was determined as a factual issue. It therefore presents no question appropriate for certiorari. United States v. Johnston, 268 U.S. 220, 227 (1925). In deciding as it did, the New York court did not reach the alternative ground which had been argued and which respondent believes to be compelling: that where property is discarded in the course of an illegal detention, as a matter of law there can be no abandonment. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968); Massachusetts v. Painten, 368 F.2d 142, 144 (1st Cir. 1966), cert. dism. as improvidently granted, 389 U.S.560 (1968); People v. Baldwin, 25 N.Y.2d 66, 70 (1969).

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

HENRY WINESTINE
WILLIAM E. HELLERSTEIN
Attorneys for Respondent